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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA

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10 JAMES H. GREEN, Case No. 3:11-cv-00230-MMD-VPC
11 v. Petitioner,
12 E.K. McDANIEL, et al., ORDER
13 Respondents.
14

15 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28
16 U.S.C. § 2254, by a Nevada state prisoner.

17 On March 14, 2012, the Court entered an order, granting in part and denying in
18 part, respondents' motion to dismiss the petition. (Dkt. no. 28). The Court made specific
19 findings that Grounds 5B and 5D of the petition were unexhausted. (*Id.*) Petitioner was
20 granted leave to do one of the following:

21 (1) inform this court in a sworn declaration that he wishes to formally and
22 forever abandon the unexhausted grounds for relief in his federal habeas
23 petition and proceed on the exhausted grounds; OR (2) inform this court in
24 a sworn declaration that he wishes to dismiss this petition without
25 prejudice in order to return to state court to exhaust his unexhausted
claims; OR (3) file a motion for a stay and abeyance, asking this court to
hold his exhausted claims in abeyance while he returns to state court to
exhaust his unexhausted claims.

26 (Dkt. no. 28, at p. 10). Petitioner has filed a motion for a stay and abeyance. (Dkt. no.
27 45.) Respondents oppose petitioner's motion. (Dkt. no. 46.)

1 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations
2 upon the discretion of the court to facilitate habeas petitioners' return to state court to
3 exhaust claims. The *Rhines* Court stated:

4 [S]tay and abeyance should be available only in limited circumstances.
5 Because granting a stay effectively excuses a petitioner's failure to
6 present his claims first to the state courts, stay and abeyance is only
7 appropriate when the district court determines there was good cause for
8 the petitioner's failure to exhaust his claims first in state court. Moreover,
9 even if a petitioner had good cause for that failure, the district court would
abuse its discretion if it were to grant him a stay when his unexhausted
claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application
for a writ of habeas corpus may be denied on the merits, notwithstanding
the failure of the applicant to exhaust the remedies available in the courts
of the State").

10 *Rhines*, 544 U.S. at 277. The court went on to state that, "[I]t likely would be an abuse
11 of discretion for a district court to deny a stay and to dismiss a mixed petition if the
12 petitioner had good cause for his failure to exhaust, his unexhausted claims are
13 potentially meritorious, and there is no indication that the petitioner engaged in
14 intentionally dilatory litigation tactics." *Id.* at 278. The Ninth Circuit has held that the
15 application of an "extraordinary circumstances" standard does not comport with the
16 "good cause" standard prescribed by *Rhines*. *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th
17 Cir. 2005). The Court may stay a petition containing both exhausted and unexhausted
18 claims if: (1) the habeas petitioner has good cause; (2) the unexhausted claims are
19 potentially meritorious; and (3) petitioner has not engaged in dilatory litigation tactics.
20 *Wooten v. Kirkland*, 540 F.3d 1019, 1023-24 (9th Cir. 2008).

21 In the instant case, petitioner's federal petition is undisputedly a mixed petition.
22 Petitioner has demonstrated good cause under *Rhines* for the failure to exhaust all
23 grounds of the federal petition prior to filing it. Further, the grounds of the federal petition
24 that petitioner seeks to exhaust in state court are not "plainly meritless" under the
25 second prong of the *Rhines* test. Finally, there is no indication that petitioner engaged in
26 dilatory litigation tactics. This Court concludes that petitioner has satisfied the criteria for
27 a stay under *Rhines*. Petitioner's motion for a stay and abeyance of this federal habeas
28 corpus proceeding is granted.

1 It is therefore ordered that petitioner's motion for issuance of stay and abeyance
2 (dkt. no. 45) is granted.

3 It is further ordered that this action is stayed pending exhaustion of the
4 unexhausted claims. Petitioner may move to reopen the matter following exhaustion of
5 the claims.

6 It is further ordered that the grant of a stay is conditioned upon petitioner filing a
7 state post-conviction petition or other appropriate proceeding in state court within forty-
8 five (45) days from the entry of this order and returning to federal court with a motion to
9 reopen within forty-five (45) days of issuance of the remittitur by the Supreme Court of
10 Nevada at the conclusion of the state court proceedings.

11 It is further ordered that, as a condition of the stay, petitioner shall exhaust all of
12 his unexhausted claims in state court during the stay of this action.

13 It is further ordered that this action shall be subject to dismissal upon a motion by
14 respondents if petitioner does not comply with the time limits in this order, or if he
15 otherwise fails to proceed with diligence during the stay imposed pursuant to this order.

16 It is further ordered that the Clerk shall administratively close this action, until
17 such time as the Court grants a motion to reopen the matter.

DATED THIS 6th day of June 2014.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE